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No. 78-1204

In the Supreme Court of the United States

OCTOBER TERM, 1978

JEANNINE HONICKER, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 28a-32a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1978. A petition for rehearing was denied on January 22, 1979. The petition for a writ of certiorari was filed on February 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly dismissed a petition for review of the Nuclear Regulatory Commission's refusal of petitioner's request to terminate virtually all nuclear power-related activities while a final decision on

her petition, which raises many complex and controversial technical issues, is being considered.

STATUTES INVOLVED

The relevant section of the Atomic Energy Act, Section 189, 42 U.S.C. 2239, is set forth at Pet. App. 46a-47a. The relevant portion of the Administrative Orders Review Act, 28 U.S.C. 2342(4), is set forth at Pet. App. 42a-43a.

STATEMENT

On July 29, 1978, Ms. Honicker petitioned the Nuclear Regulatory Commission to revoke the licenses of all nuclear plants and nuclear fuel cycle facilities, arguing that activities now licensed by the Commission are "inextricably intertwined with the release of deadly poisons to the biosphere." The petitioner termed her 152-page request an emergency petition and called upon the Commission "to begin emergency and remedial action within 30 days." On August 30, 1978, the Commission informed Ms. Honicker that her submission would be considered a request for enforcement action under Commission regulations and that "appropriate action will be taken on this request within a reasonable time" (Pet. App. 33a-34a). See 10 C.F.R. 2.206. Petitioner objected to this course in a telegram to the Commission and insisted on "emergency action." On September 7, 1978, the Commission informed Ms. Honicker by a letter from its Secretary that in light of the numerous technical issues raised in her petition the Commission believed it necessary to solicit the views of its technical staff before taking any action (Pet. App. 35a-37a). The Commission also stated it would take no action pending receipt of those views because of "its intention to address the matter expeditiously, and the lack of a clear demonstration of need for emergency action." (*id.* at 37a). On November 6, Ms. Honicker filed a petition for review of that Commission letter in the court of appeals.

In December, after receipt of the technical staff's views, the Commission concluded that the petition primarily challenged the adequacy of Commission regulations, a matter appropriately addressed by the Commission itself. See 10 C.F.R. 2.802. This was communicated to petitioner on December 6, 1978 (Pet. App. 38a-40a). In that letter the Commission also reaffirmed its earlier opinion that the emergency action requested—summary revocation of licenses, which had been issued only after careful adjudicatory hearings— would be inappropriate pending a full review of the issues raised in the petition, (*id.* at 39a). The Commission has not yet reached a decision on the merits of the petition.

On December 21, 1978, the District of Columbia Circuit *sua sponte* dismissed on jurisdictional grounds Ms. Honicker's petition for review of the Commission's September 7 letter (Pet. App. 28a-32a). That decision rested on two bases. First, the letter of September 7 denying emergency action was not a reviewable "final order", *i.e.*, agency action which "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process" (Pet. App. 30a). Second, even if judicial review were available, "the appropriate disposition of this appeal would be to defer to the Commission's discretion and greater expertise on such questions of 'interim relief' " (*id.* at 31a-32a).

Petitioner's request for rehearing was denied on January 22, 1979. This petition followed.

ARGUMENT

The decision of the court of appeals does not merit review by this Court.

The issues decided by the court below are not the series of constitutional questions raised by petitioner, but whether the letter informing petitioner that there was no need to undertake emergency action was a reviewable order of the

Commission and whether the court of appeals properly deferred to the Commission on the matter of emergency relief. Neither of those questions warrants consideration by this Court.

The court of appeals found that the Commission's letter was not a final order subject to judicial review. It has long been settled that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-113 (1948). Thus, a preliminary or procedural ruling does not constitute a final order within the meaning of the Administrative Orders Review Act for purposes of court of appeals review. Whether the Commission's determination that no emergency relief should issue pending a full administrative review of the petition's highly technical questions is a non-final order, as the court of appeals held, only presents an application of the *Waterman* rule and is neither a novel nor an important issue which merits this Court's attention.

The second aspect of the court of appeals' decision—giving deference to the Commission's decision on the appropriateness of emergency relief—is likewise not a matter warranting this Court's intervention. The Commission reasonably concluded that relief, if any, should not be ordered without a thorough examination of the issues. In this case, the court of appeals properly deferred to the expertise of the Commission, the agency charged by Congress with the responsibility of regulating the subject matter addressed by the petitioner. *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970); see *Nader* v. *Nuclear Regulatory Commission*, 513 F. 2d 1045 (D.C. Cir. 1975).

Finally, the theory of petitioner's case is that she is entitled to an emergency termination of nuclear fuel cycle

activities if it can be shown that these activities are at all life-threatening. However, as this Court states last Term in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978) (emphasis in original):

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which the courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

The decision of the court of appeals avoids premature judicial action and permits the Commission to decide the questions presented in a reasonable fashion with due consideration for differing scientific opinions. We submit that decision is correct and does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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